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Terrence M. King

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SCHAD V. BOROUGH OF MOUNT EPHRAIM: A PYRRHIC VICTORY FOR FREEDOM OF EXPRESSION?

I. INTRODUCTION

The zoning power¹ and the first amendment right of free expression,² collided at the Supreme Court level for only the second time in *Schad v. Borough of Mount Ephraim*.³ As in the initial confrontation,⁴ the Court was faced with the difficult question of how the right of free expression limits a municipality's exercise of the zoning power. In

1. The Supreme Court recognized zoning as a legitimate aspect of the police power in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). The police power is the broad legislative power vested in the states which enables them to address problems or needs of local public interest. The police power, when exercised for zoning purposes, has been referred to as the "zoning power." D. MANDELKER, *THE ZONING DILEMMA* 3 (1970). In *Berman v. Parker*, 348 U.S. 26, 32-33 (1954), the Court described the scope of the zoning power:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

Zoning was introduced in the United States as a reform of the nuisance law that had been made necessary by the rapidly increasing complexity of modern urban life. R. NELSON, *ZONING AND PROPERTY RIGHTS* 7 (1977). It is generally accepted that zoning began in 1916 with the New York City zoning ordinance. *Id.* at 8. The New York City ordinance divided the city into residential, commercial, and unrestricted-use districts. *Id.* at 9. Building height was also regulated. *Id.* Ordinances based on the New York model were rapidly introduced so that by 1926, the year *Euclid* was decided, 425 municipalities representing more than half the urban population of the country had enacted zoning ordinances. *Id.*

2. U.S. CONST. amend. I provides in part: "Congress shall make no law . . . abridging the freedom of speech" The first amendment is incorporated into the fourteenth amendment due process clause. *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). The first amendment embraces many forms of communicative expression as speech. *See, e.g.*, *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (films, books, and other forms of speech are protected by the first amendment).

3. 452 U.S. 61 (1981).

4. The initial confrontation between free expression and the zoning power at the Supreme Court level occurred in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J., concurring). For a discussion of *Young* see *infra* notes 36-67 and accompanying text. *See also*, Note, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1196 (1976); Note, *Young v. American Mini Theatres, Inc.: A Limit on First Amendment Protection*, 12 NEW ENG. L. REV. 391, 416-18 (1976); Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L. Q. 321, 357-59 (1977); Note, *Zoning, Adult Movie Theatres, and the First Amendment: An Approach to Young v. American Mini Theatres, Inc.*, 5 HOFSTRA L. REV. 379, 410-11 (1977).

Schad, the question was complicated by the fact that the challenged zoning ordinance had been used to prohibit a controversial form of expression: adult entertainment.⁵ The municipality contended, and the state courts agreed, that the imposition of criminal penalties for the exhibition of live nude dancing within a commercial zone was a legitimate exercise of the zoning power.⁶

The Supreme Court, however, rejected this contention in *Schad*. Relying on the first amendment overbreadth doctrine,⁷ a majority of the Court held that the zoning ordinance, as construed by the state courts, imposed an overbroad prohibition on protected forms of expression.⁸ The decision therefore assumes special significance as the first instance where a majority of the Court has sustained a first amendment challenge to the zoning power.⁹

The triumph of the right of free expression, however, was less than complete. The overbreadth analysis employed by the majority necessarily framed the issue in general terms; the majority focused on the right to view and exhibit "all live entertainment."¹⁰ The facts of *Schad* arguably presented an opportunity to resolve the lingering question of whether adult entertainment enjoys the same degree of protection af-

5. It is important . . . to keep in mind the distinction between, on the one hand, "adult" books and movies and on the other hand, "obscene" books and movies. Although the public mind may tend to equate the two, the law allows no such equation. Numerous judicial pronouncements recognize that "sex and obscenity are not synonymous." *Roth v. United States*, 354 U.S. 476, 487 (1957). Obscenity, in the legal sense requires the tri-partite test enunciated in *Miller v. California*, 413 U.S. 15 (1973). . . . Thus, as a matter of legal terminology, the terms "adult" and "sexually-oriented" contain an implicit presumption that the materials referred to are legal and nonobscene, or at least that they are protected until there has been a judicial determination of their obscenity.

F. STROM, ZONING CONTROL OF SEX BUSINESSES 3 n.11 (1977). This note uses the term "adult entertainment" to refer to commercial, nonobscene forms of entertainment that are sexually oriented. This includes sexually oriented books, magazines, films, and live performances.

6. 452 U.S. at 64.

7. The first amendment overbreadth doctrine protects first amendment rights from laws that "are so broadly drafted that the range of possible applications violating the first amendment is substantial." In an overbreadth analysis, the law in question is scrutinized on its face "without regard to the particular complainant's conduct. Rather than excise particular invalid applications one by one as they arise, the Court has employed the first amendment overbreadth doctrine to short circuit the process by invalidating the statute and putting it up to the legislature for redrafting." Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844-45 (1970) (footnote omitted).

8. 452 U.S. at 66, 76-77.

9. For a discussion of prior unsuccessful first amendment challenges to the zoning power, see *infra* notes 22-67 and accompanying text.

10. 452 U.S. at 65-66.

forded other forms of expression.¹¹ The majority's analysis avoided this question, leaving local zoning authorities without clear guidance in their efforts to regulate adult entertainment.

Moreover, due to the manner in which the majority posed the issue in *Schad*, the scope of the holding is susceptible of dramatically conflicting interpretations. Interpreted broadly, the opinion implies that a political subdivision cannot completely exclude or ban nonobscene adult entertainment from its jurisdiction. Interpreted narrowly, however, the opinion may imply the contrary conclusion that the zoning power, under certain circumstances, may properly be used to ban adult entertainment within the boundaries of a zoning entity. This ambiguity inspired several of the Justices to address the unanswered questions in separate opinions. Consequently, the decision, which purports to resolve the difficult constitutional issue on settled first amendment principles, contains within it the seeds of further complications of this "still emerging area of the law."¹²

This note will analyze the *Schad* decision and highlight the historical relationship between the zoning power and the first amendment. It will assay the scope of the holding and its possible impact upon future conflicts between free expression and the zoning power. In addition, this note will scrutinize suggestions by certain members of the *Schad* Court that, under special circumstances, heretofore protected forms of expression may properly be banned from a community through the use of the zoning power. The rationale and precedent supporting and undercutting this assertion will be analyzed in light of its potential for future application.

II. HISTORICAL FRAMEWORK

A. The Zoning Power: The Presumption of Validity

The Supreme Court first recognized the zoning power in *Village of Euclid v. Ambler Realty Co.*¹³ In *Euclid*, a property owner challenged a local zoning ordinance that restricted certain zones within a political subdivision to residential use only, claiming that the state was depriving him of a property right without due process of law.¹⁴ The Court

11. See *infra* notes 36-67 and accompanying text for a discussion of the *Young* decision which raises this question; see also Note, *Young v. American Mini Theaters, Inc.: Creating Levels of Protected Expression*, 4 HASTINGS CONST. L. Q. 321, 357 (1977).

12. 452 U.S. at 77 (Blackmun, J., concurring).

13. 272 U.S. 365 (1926). "This question involves the validity . . . of . . . zoning legislation . . . Upon that question this Court has not thus far spoken." *Id.* at 390.

14. *Id.* at 384.

upheld the ordinance as a legitimate exercise of the police power.¹⁵ In reaching this conclusion, the Court emphasized that the local legislative body had conducted an extensive investigation of the local situation before deciding that the ordinance was necessary.¹⁶ The Court, therefore, abstained from further review, holding: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."¹⁷ The Court stated that, absent a showing by the aggrieved party that the ordinance was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare," the zoning power was to prevail.¹⁸ The *Euclid* Court thus explicitly established that zoning ordinances, as legislative acts, should not be entirely overturned unless clearly demonstrated to be arbitrary and unreasonable. That holding became the basis for the enduring doctrine that zoning ordinances enjoy a special presumption of validity.

It is important to note that the right allegedly infringed by the zoning ordinance in *Euclid* was a *property* right. Property rights are not among the *fundamental* rights which receive special constitutional protection.¹⁹ Accordingly, the *Euclid* Court confined its inquiry to the ele-

15. *Id.* at 397.

16. *Id.* at 394.

The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will [serve to promote the public welfare]

Id.

17. *Id.* at 388 (citations omitted).

18. *Id.* at 395.

19. The Supreme Court has developed a multi-tier approach to the review of state ordinances attacked under the due process and equal protection clauses to the fourteenth amendment. Where a fundamental right (such as the right to vote or freedom of speech) or a suspect class (such as a racial minority) is affected, the Court applies the so-called strict scrutiny test. Under this test the Government has the significant burden of showing that the state's interest is compelling and that no less intrusive means of promoting that interest are available. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'") (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("the right of suffrage is a fundamental matter in a free and democratic society . . . [hence] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized").

If neither a fundamental right nor a suspect class is implicated by the statute, the Court applies the less rigorous rational basis or reasonable relationship test. Under that standard of review, the statute is presumed constitutional and will not be overturned unless the party attacking the statute demonstrates that it is arbitrary and unreasonable. *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). The Court will uphold such a classification if it can hypothesize that it was based

mentary question of whether the ordinance was reasonably related to a legitimate state purpose. The ordinance readily passed muster under this limited standard of review. Because zoning power is merely an aspect of the police power, any zoning ordinance which infringed upon a fundamental right, in principle, should be subject to the most rigorous standard of judicial review.²⁰ However, on the few occasions subsequent to *Euclid* that the Court has reviewed an exercise of the zoning power, the Court has customarily applied only minimal scrutiny even where fundamental rights were arguably implicated.²¹ Such continual deference to legislative judgment logically implies that the presumption of validity accorded zoning legislation is especially difficult to overcome.

B. The Zoning Power and the First Amendment

While *Euclid* settled the question of the constitutionality of general zoning ordinances,²² the more difficult question of how and under what circumstances the first amendment protection limits a community's exercise of the zoning power was not considered by the Court until forty-eight years later. In *Village of Belle Terre v. Boraas*,²³ the Court reviewed a zoning ordinance enacted by a small residential community which limited the number of unrelated persons who could reside in a single household.²⁴ A number of unrelated students who were leasing a house in the Village challenged the provision on the ground, *inter alia*, that the zoning ordinance impermissibly burdened the exer-

"upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy" *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1950). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 996 (1978).

20. See *supra* note 19.

21. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26 (1954); *Zahn v. Board of Public Works*, 274 U.S. 325 (1927); *Gorieb v. Fox*, 274 U.S. 603 (1927). In a recent case, however, a plurality of the Court recognized that the zoning ordinance in question burdened the exercise of a fundamental right; accordingly, the Court applied strict scrutiny analysis. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1976) (four justices concluding that zoning ordinance that expressly prohibited certain relatives from living together, impermissibly infringed upon fundamental privacy rights). For a detailed discussion of the presumption of validity in the zoning context, see Note, *Freedom of Expression in the Land Use Planning Context: Preserving the Barrier of Presumptive Validity*, 28 U. FLA. L. REV. 954 (1976); see *infra* notes 23-35 and accompanying text.

22. See *supra* notes 13-21 and accompanying text.

23. 416 U.S. 1 (1974).

24. *Id.* at 2. "The word 'family' as used in the ordinance means '[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.'" *Id.*

cise of their fundamental first amendment right of freedom of association.²⁵

In a terse response to this claim, the Court stated simply that "[t]he ordinance places no ban on . . . forms of association, for a 'family' may, so far as the ordinance is concerned, entertain whomever it likes."²⁶ Because, by hypothesis, "no 'fundamental' right guaranteed by the Constitution"²⁷ was involved, the ordinance retained the presumption of validity "historically"²⁸ recognized by the Court. The Court emphasized the broad scope of the zoning power, explaining that "[t]he police power [to zone] is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."²⁹ By rejecting the freedom of association challenge by judicial fiat, as distinguished from principled analysis, the Court continued to demonstrate enormous deference to the zoning power, even when fundamental rights were arguably implicated.

In a dissent in *Belle Terre*, Justice Marshall criticized the Court's deference to the zoning power in the face of the ordinance's burden on a fundamental right. He accepted the premise that "zoning is a complex and important function of the State" and that "[i]t may indeed be the most essential function performed by local government."³⁰ In addition, he accepted the *Euclid* principle that "deference should be given to governmental judgments concerning proper land-use allocation."³¹ He insisted, however, that "deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of . . . legitimate aims, do not infringe upon fundamental constitutional rights."³² Justice Marshall went on to urge that the ordinance reached beyond land use control and impermissibly regulated "the way people choose to associate with each other within the privacy of their own homes."³³ Because the ordinance infringed the appellants' fundamental rights of association and privacy, and because

25. *Id.* at 7, 13.

26. *Id.* at 9.

27. *Id.* at 7. In *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) the Court defined the fundamental right of association as the "freedom to engage in association for the advancement of beliefs and ideas."

28. *Id.* at 8.

29. *Id.* at 9.

30. *Id.* at 13.

31. *Id.*

32. *Id.* at 14.

33. *Id.* at 17.

there was no showing that the ordinance was necessary to promote a compelling state interest, the provision was unconstitutional in Justice Marshall's view.³⁴ Justice Marshall suggested that "the village continue to pursue those [legitimate] purposes but by means of more carefully drawn and evenhanded legislation."³⁵

Although the majority opinion in *Belle Terre* reinforced the strong policy of deference towards the zoning power, Justice Marshall's dissent laid a well-reasoned foundation for a future first amendment challenge. Such a challenge reached the Court two years later, in 1976, in *Young v. American Mini Theatres*.³⁶ *Young* was "the first case in [the Supreme] Court in which the interests in free expression protected by the First and Fourteenth Amendments [had] been implicated by a municipality's commercial zoning ordinances."³⁷ The controversy involved the city of Detroit's effort to prevent or ameliorate neighborhood deterioration by regulating the location of, *inter alia*, "adult" theaters.³⁸ Based upon a legislative finding that certain land uses were injurious to a neighborhood when concentrated within a limited area,³⁹ Detroit enacted comprehensive zoning legislation which required certain specific land uses, including adult theaters and bookstores, to be physically dispersed.⁴⁰

Local adult bookstore and theater owners challenged the zoning ordinances on the grounds that (1) the ordinances were void for vagueness under the due process clause of the fourteenth amendment; (2) the ordinances constituted invalid prior restraints on protected communication; and (3) the classification of theaters on the basis of the adult content of their exhibitions violated the equal protection clause.⁴¹

In an opinion written by Justice Stevens, a five-to-four majority of the Court upheld the ordinance, although one of the five, Justice Powell, explicitly rejected the equal protection analysis.⁴² Five members of

34. *Id.* at 18.

35. *Id.* at 20.

36. 427 U.S. 50 (1976).

37. *Id.* at 76 (Powell, J., concurring).

38. *Id.* at 52.

39. *Id.* at 54 n.6.

40. *Id.* at 52. The ordinance prohibited an adult theater from being located within 1000 feet of any two other "regulated uses." *Id.* "Regulated uses" included adult establishments such as bookstores and motion picture theaters that emphasized or depicted "Specified Sexual Activities" or "Specified Anatomical Areas." *Id.* at 53, nn.4 & 5.

41. *Id.* at 58.

42. Justice Powell was the fifth member in favor of upholding the ordinance, but he stated: "[M]y approach to the resolution of this case is sufficiently different to prompt me to write separately." *Id.* at 73.

the Court supported Justice Stevens' rejection of the vagueness challenge.⁴³ The same majority joined in Justice Stevens' conclusion that the ordinance was not an impermissible prior restraint on protected expression.⁴⁴ Justice Stevens pointed out that neither exhibitors nor the public were denied *access* to purvey or view the expression in question. He reasoned that the ordinances did not impose a limit "on the total number of adult theaters which may operate in the city of Detroit Viewed as an entity, the market for this commodity is essentially unrestrained."⁴⁵ Detroit's strong interest in preventing urban decay, therefore, justified the regulation of the *place* where such films may be exhibited.⁴⁶

Four members of the majority viewed the central issue in *Young* as whether the classification by adult content was "consistent with the Equal Protection Clause."⁴⁷ Using a novel analysis,⁴⁸ the plurality declared that the legislative classification treating adult theaters differently from other theaters did not deny the adult theater owners equal protection. Their argument was based upon the assertion that "even though . . . the First Amendment will not tolerate total suppression of erotic materials that have some arguable artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate" ⁴⁹ Having determined that the right burdened by the

43. *Id.* at 58-61. Justice Powell joined that part of the Court's opinion which rejected the vagueness and prior restraint challenges. *Id.* at 73.

44. *Id.* at 62-63. The Court has long disfavored governmental restraint of expression prior to its publication or exhibition because of the possibility that valid expression will be directly suppressed or inhibited by inducing caution in the speaker before a determination that the expression is unprotected. *See* *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Near v. Minnesota*, 283 U.S. 697, 716 (1931). The doctrine of prior restraint does not afford absolute protection to first amendment speech, but any system of prior restraint bears a strong presumption of unconstitutionality. *See* *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

45. 427 U.S. at 62.

46. *Id.* at 62-63.

47. *Id.* at 63. Justice Powell did not join this part of the Court's opinion. *Id.* at 73 n.1. Thus, the controversial equal protection analysis represents the opinion of only a four member plurality.

48. The novelty of the analysis lies in its suggestion that nonobscene adult entertainment is entitled to less protection under the first amendment than other forms of speech and expression. *Id.* at 70; *see* Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L. Q. 321, 357 (1977).

49. 427 U.S. at 70. Also, earlier in the opinion discussing vagueness, Justice Stevens stated: "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the border line between pornography and artistic expression than in the free dissemination of ideas of social and political significance" *Id.* at 61.

ordinances was not as important as fundamental first amendment rights of political or philosophical expression, the plurality held that the classification by adult content did not deny equal protection if the expression in question was not totally suppressed.⁵⁰ Justice Stevens' completed the analysis by reasoning that Detroit's "interest in preserving the character of its neighborhoods" amply justified the differential treatment of adult theaters.⁵¹

Justice Powell concurred in the *Young* judgment but did not join in Justice Stevens' equal protection analysis.⁵² He did not share the plurality's view that nonobscene erotic materials may be treated differently under the first amendment than other forms of expression.⁵³ Instead, he thought it appropriate to weigh the competing interests as the Court had done in *United States v. O'Brien*.⁵⁴ The *O'Brien* Court had declared that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the *nonspeech* element can justify incidental limitations on First Amendment freedoms."⁵⁵ Justice Powell in *Young* recognized that "[t]he factual distinctions between . . . *O'Brien* and this case are substantial, but the essential weighing and balancing of

50. *Id.* Justice Stevens stated: "Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." *Id.* at 70-71.

51. Justice Stevens did not explicitly disclose which level of equal protection analysis he employed. However, because he notes that society's interest in protecting sexually explicit material is "of a wholly different, and lesser, magnitude than the interest in untrammelled political debate," it appears that he was applying some intermediate and less demanding standard of review than traditional strict scrutiny. *Id.* For a lower court's interpretation of Stevens' equal expression analysis, see *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 700 (M.D. Fla. 1978) (holding that an ordinance similar to Detroit's, which had the practical effect of suppressing the exhibition of adult entertainment, was invalid under the first amendment).

52. 427 U.S. at 73.

53. *Id.* at 73 n.1. "I do not think we need reach, nor am I inclined to agree with, the holding . . . that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.*

54. 391 U.S. 367 (1968). *O'Brien* involved the criminal prosecution of a draft card burner. The Court applied a four-part test to determine whether the government could limit conduct involving both speech and nonspeech. Under that test a government regulation is sufficiently justified, despite its incidental impact upon first amendment interests, "if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction . . . on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

55. *Id.* at 376 (emphasis added).

competing interests are the same."⁵⁶

Applying this balancing test to the facts in *Young*, Justice Powell determined that the ordinance operated to silence no message, invoked no censorship, and imposed no limitation upon those who wished to view adult movies.⁵⁷ He then concluded that the "degree of incidental encroachment upon such expression was the minimum necessary to further the purpose of the ordinance," and that the need to prevent urban decay clearly justified the ordinance.⁵⁸ Thus, under Justice Powell's analysis, the City's strong and legitimate interest outweighed the "incidental and minimal"⁵⁹ burden on the first amendment right.

The fundamental division of the *Young* Court on the issue of the differential treatment of adult theaters and bookstores was evinced by the four dissenters⁶⁰ who regarded the majority's treatment of the case as a "drastic departure from established principles of First Amendment law."⁶¹ Justice Stewart, writing for the dissent, argued that "[t]he kind of expression at issue here is no doubt objectionable to some, but that does not diminish its protected status"⁶² In his view, a "prime function of the First Amendment is to guard against [selective] interference" with expression "whose content is thought [by some] to produce distasteful effects."⁶³ Articulating the traditional rationale underlying the first amendment, Justice Stewart warned:

The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the market place of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.⁶⁴

56. 427 U.S. at 80. For a well reasoned argument that Justice Powell misapplied the *O'Brien* test, see Note, *Zoning, Adult Movie Theatres and the First Amendment: An Approach to Young v. American Mini Theatres, Inc.*, 5 HOFSTRA L. REV. 379, 398-400 (1977).

57. 427 U.S. at 78.

58. *Id.* at 81-82. Justice Powell also stated: "It is clear both from the chronology and from the facts that Detroit has not embarked on an effort to suppress free expression." *Id.* at 80. Thus, the fact that Detroit had acted in good faith to solve a serious problem helped justify the regulation of adult theaters.

59. *Id.* at 78.

60. Justice Stewart wrote in dissent joined by Justices Brennan, Marshall and Blackmun. See *id.* at 84. Justice Blackmun also wrote a separate dissent. See *id.* at 88.

61. *Id.* at 84.

62. *Id.* at 85.

63. *Id.*

64. *Id.* at 88.

Absent a judicial determination of obscenity, it was not clear to Justice Stewart that the speech involved was less "important" than other forms of speech.⁶⁵ Thus, the dissent could "only interpret . . . [the] decision as an aberration."⁶⁶

In *Young*, the Court again accorded great deference to the zoning power, this time in the face of a direct first amendment challenge. The willingness of at least four Justices to advocate a narrowing of the scope of first amendment protection in a zoning context⁶⁷ suggests that the zoning power had assumed a new and stronger position as against nonpolitical rights of free expression. The importance of the fundamental rights at stake, the sharply conflicting opinions, and the lack of a consistent rationale rendered *Young* a confusing precedent in need of clarification. In 1981, the facts in *Schad* presented the Court with an opportunity to do just that.

III. FACTS OF THE CASE

At the time of the zoning violation in question, the Borough of Mount Ephraim (Borough), Camden County, New Jersey, was a municipality entrusted with zoning responsibilities.⁶⁸ The Borough's zoning ordinance provided for four commercial zones, including the one at issue along Black Horse Pike (Black Horse Pike commercial zone).⁶⁹ The remainder of the community was zoned for residential use.⁷⁰ Section 99-15B of the ordinance described the specific uses permitted in a commercial zone.⁷¹ Section 99-4 provided that "[a]ll uses not expressly

65. *Id.* at 87.

66. *Id.*

67. *See supra* notes 48-51 and accompanying text.

68. 452 U.S. at 76.

69. *Id.* at 81 n.3 (Stevens, J., concurring in judgment only). Section 99-15A of the MOUNT EPHRAIM, N.J. CODE states the purpose of the commercial zone as follows:

A. Purpose. The purpose of this district is to provide areas for local and regional commercial operations. The zone district pattern recognizes the strip commercial pattern which exists along Kings Highway and the Black Horse Pike. It is intended, however, to encourage such existing uses and any new uses or redevelopment to improve upon the zoning districts of greater depth, by encouraging shopping center-type development with buildings related to each other in design, landscaping and site planning, and by requiring off-street parking, controlled ingress and egress, greater building set backs, buffer areas along property lines adjacent to residential uses, and a concentration of commercial uses into fewer locations to eliminate the strip pattern.

Id. at 63 n.2.

70. *Id.* at 63 n.1, 81 n.3.

71. *Id.* at 63. Section 99-15B of the MOUNT EPHRAIM, N.J. CODE described the permitted uses in a commercial zone as follows:

B. Principal permitted uses on the land and in buildings.

(1) Offices and banks; taverns; restaurants and luncheonettes for sit-down

permitted in this chapter are prohibited."⁷² No form of entertainment was expressly permitted.⁷³ At least three establishments located in the Black Horse Pike commercial zone, however, offered some form of live entertainment,⁷⁴ and there was apparently a commercial movie theater operating within the zone as well.⁷⁵

In 1973, appellants (bookstore owners) opened an adult bookstore within the Black Horse Pike commercial zone.⁷⁶ In addition to selling adult books, magazines, and films, the store exhibited adult films in coin-operated private booths pursuant to a license issued by the Borough.⁷⁷ In 1976, the bookstore owners added a coin-operated mechanism which exhibited a live dancer (usually nude) behind a glass panel.⁷⁸ Thereafter, the Borough filed complaints against the bookstore owners, charging, *inter alia*, that the exhibition of live dancing within the Black Horse Pike commercial zone violated section 99-15B of the Mount Ephraim zoning ordinance.⁷⁹

The bookstore owners were found guilty and fined in the municipal court.⁸⁰ Their appeal to the Camden County Court resulted in a trial *de novo* on the municipal court record, at which the bookstore owners were again found guilty.⁸¹ The county court construed the ordinance as prohibiting all live entertainment in any establishment within the Black Horse Pike commercial zone.⁸² The bookstore owners contended, *inter alia*, that the ordinance was being selectively and improperly enforced against them in that the Borough permitted other

dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries; pet stores; and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of the stores.

(2) Motels.

Id.

72. *Id.* at 64 (quoting MOUNT EPHRAIM, N.J. CODE section 99-4).

73. *Id.* at 81 n.2 (Stevens, J., concurring).

74. *Id.* at 64 n.3.

75. *Id.* at 82 n.7 (Stevens, J., concurring).

76. *Id.* at 62.

77. *Id.*

78. *Id.*

79. *Id.* at 63. The bookstore owners were also charged with other violations, which they successfully defended in the state courts, in connection with the repainting of their exterior sign. *Id.* at 82 n.8 (Stevens, J., concurring).

80. *Id.* at 64.

81. *Id.*

82. *Id.*

establishments in the Black Horse Pike commercial zone to exhibit live entertainment.⁸³ The county court rejected that argument, holding that other live entertainment establishments were permitted nonconforming uses that had existed prior to the passage of the ordinance.⁸⁴

The county court also ruled that the bookstore owners' first amendment rights had not been violated.⁸⁵ Relying on *Young v. American Mini Theatres*,⁸⁶ this court reasoned that first amendment guarantees were not involved because this case involved solely a zoning ordinance that simply forbade live entertainment in any form.⁸⁷ The Appellate Division of the Superior Court affirmed, and the Supreme Court of New Jersey denied further review.⁸⁸

The bookstore owners appealed to the United States Supreme Court.⁸⁹ The Court reversed and remanded, holding that the imposition of criminal penalties under an ordinance that prohibited all live entertainment violated the bookstore owners' right of free expression guaranteed by the first and fourteenth amendments to the Constitution.⁹⁰

IV. REASONING OF THE COURT

A. Justice White's Opinion for the Court

Presented with a number of claims on appeal, the majority chose to resolve the controversy in *Schad* on first amendment grounds.⁹¹ The Court's analysis began with a determination that the Supreme Court was bound by the New Jersey state court's construction of the zoning ordinance;⁹² as construed, live entertainment including nude dancing, was not a permitted use in any establishment within the Borough.⁹³ The Court observed that by excluding all live entertainment, the zoning ordinance by its terms prohibited "a wide range of expression that has

83. *Id.*

84. *Id.* at 64 n.3.

85. *Id.* at 64.

86. 427 U.S. 50 (1976). See *supra* notes 36-67 and accompanying text for a discussion of *Young*.

87. 452 U.S. at 64-65.

88. *Id.* at 65.

89. *Id.*

90. 452 U.S. at 65.

91. "Appellants also contend that the zoning ordinance, as applied to them, violates due process and equal protection Since we sustain appellants' First Amendment challenge to the ordinance, we do not address these additional claims." *Id.* at 65 n.4.

92. The Court observed that "the Mount Ephraim Code has been construed by the New Jersey courts — a construction that is binding upon us" *Id.* at 65.

93. *Id.*

long been held to be within the protections of the First and Fourteenth Amendments."⁹⁴ The Court pointed out that many forms of entertainment, "as well as political and ideological speech," are protected by the first amendment.⁹⁵ It further noted that "nude dancing is not without its First Amendment protections from official regulation."⁹⁶

The Court next established that "[b]ecause overbroad laws, like vague ones, deter privileged activit[ies],"⁹⁷ the bookstore owners could rely on the impact of the ordinance upon the expressive activities of others—as well as their own—to establish their standing.⁹⁸ Because the ordinance impacted upon the rights of anyone who wished to view or exhibit live entertainment, the bookstore owners clearly had standing to raise an overbreadth challenge.⁹⁹

From the broad premise that the zoning ordinance excluded a wide range of protected expression, the Court proceeded to analyze the issue relying on settled first amendment principles. The Court asserted that, while the zoning power was "undoubtedly broad," it "must be

94. *Id.*

95. The Court cited numerous cases in support of this proposition, listing them so as to trace the chronological development of first amendment protection of entertainment: *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952) (expression by means of motion pictures was held to be within the protections of the first and fourteenth amendments); *Schacht v. United States*, 398 U.S. 58, 61-63 (1970) (a dramatic skit performed on the street to protest the Viet Nam war held to be protected); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (motion pictures depicting nudity held to be protected under the first amendment); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561-62 (1975) (live drama depicting nudity held to be a protected form of expression); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975) (motion pictures depicting nudity held protected under the first amendment); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (live topless dancing held to be protected under the first amendment); *California v. LaRue*, 409 U.S. 109, 118 (1972) (nonobscene topless and bottomless dancing found to be within the constitutional protection of freedom of expression).

96. 452 U.S. at 66 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *California v. LaRue*, 409 U.S. 109 (1972)).

97. 452 U.S. at 66 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)).

98. 452 U.S. at 66. For a definition of the first amendment overbreadth doctrine, see *supra* note 7; see also 427 U.S. at 59 n.17 (overbreadth doctrine gives standing even to parties whose own speech may not be protected). The theory underlying the expanded standing for challenges under the overbreadth doctrine is that when a statute allegedly prohibits speech, even arguably protected speech, the possible inhibitory effects wreak harm throughout society. 427 U.S. at 59 n.17.

99. 452 U.S. at 66. The Court's approach to the controversy focused upon *all* live entertainment.

Whatever First Amendment protection should be extended to nude dancing, live or on film . . . the Mount Ephraim ordinance prohibits all live entertainment in the Borough: no property in the Borough may be principally used for the commercial production of live entertainment.

Id.

exercised within constitutional limits.’”¹⁰⁰ Accordingly, even the zoning power is subject to judicial review and “the standard of review is determined by the nature of the right . . . threatened . . . rather than by the power being exercised”¹⁰¹ Because the challenged ordinance threatened the constitutionally guaranteed right of free expression, the Court stated that it must “scrutinize both the *interests* advanced by the Borough to justify this limitation on protected expression and the *means* chosen to further those interests.”¹⁰²

Before proceeding to scrutinize the Borough’s ordinance, the Court thought it necessary to distinguish *Young v. American Mini Theatres, Inc.*¹⁰³ It characterized *Young* as a case in which first amendment rights were only minimally burdened by the zoning power.¹⁰⁴ The ordinance in *Young*, the Court explained, regulated the location of adult theaters but did not exclude them.¹⁰⁵ Furthermore, in *Young*, the City of Detroit had produced evidence to show that the concentration of adult theaters led to deterioration of surrounding neighborhoods and thereby had “justified the incidental burden on First Amendment interests resulting from merely dispersing, but not excluding adult theaters.”¹⁰⁶

The *Schad* Court determined that the Borough of Mount Ephraim, on the other hand, had not justified its broad exclusion of protected expression. First, the Borough had introduced no evidence to support its contention that live entertainment would conflict with its plan to create a commercial zone limited to providing for its residents’ immediate needs.¹⁰⁷ The Court pointed out that the diverse commercial uses which the ordinance expressly permitted belied any such plan.¹⁰⁸

100. *Id.* at 68 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring)).

101. 452 U.S. at 68 (citing *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945)).

102. 452 U.S. at 71 (emphasis added).

103. 427 U.S. 50 (1976).

104. *Id.* at 71.

105. *Id.*; see *supra* notes 36-40 and accompanying text.

106. 452 U.S. at 72.

107. *Id.* The Borough had argued that the ordinance was designed to provide a limited commercial zone that would enable residents “to purchase at local stores the few items they occasionally forgot to buy outside the Borough.” *Id.* at 72 & n.13.

108. *Id.* at 72-73. The Court stated:

The range of permitted uses goes far beyond providing for the ‘immediate needs’ of the residents. Motels, hardware stores, lumber stores, banks, offices, and car showrooms are permitted in commercial zones. The list of permitted ‘retail stores’ is nonexclusive, and it includes such services as beauty salons, barber shops, cleaners, and restaurants. Virtually the only item or service that may not be sold in a com-

Second, the Court observed that the Borough had produced no evidence to support its assertion that live entertainment could selectively be excluded to prevent or ameliorate urban problems attributable to that form of expression.¹⁰⁹ Absent such evidence, the Court maintained that "it is not immediately apparent as a matter of experience, that live entertainment poses problems of this nature more significant than those associated with various permitted uses" ¹¹⁰ Third, the Court held that even if there were special problems uniquely associated with live entertainment, the Borough had failed to establish that its interest in dealing with those problems "could not be met by restrictions that are *less intrusive* on protected forms of expression."¹¹¹

Finally, the Court rejected the Borough's contention that section 99-15B was a reasonable time, place, and manner restriction.¹¹² According to the majority, in order to support such a contention, the Borough first would have to show that live entertainment was "‘basically incompatible with normal activity’" in the commercial zones.¹¹³ Because the Borough had permitted a number of commercial uses and had failed to show how live entertainment was incompatible with them, the zoning restriction was unreasonable.¹¹⁴

A second requisite of a valid time, place, and manner restriction, under the majority analysis, is that it "leave open adequate alternative channels of communication."¹¹⁵ By excluding all live entertainment, including nude dancing, the Borough had closed off all alternative channels for the communication of those forms of expression. The Court refused to accept Mount Ephraim's argument that live entertainment, including live nude dancing, was amply available outside the

mercial zone is entertainment. The Borough's first justification is patently insufficient.

Id.

109. *Id.* at 73. The Borough had contended that it could ban live entertainment for the normal reasons supporting zoning in a commercial district, *viz.*, to prevent parking, trash, police protection, and medical facility problems. *Id.*

110. *Id.*

111. *Id.* at 74 (emphasis added).

112. *Id.* If a particular form of expression is protected by the first amendment, it may be limited only by reasonable regulations as to the time, place, or manner of the expression where those regulations are necessary to further significant governmental interests. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (ban on *time* of picketing, during school hours, found reasonable); *Cox v. Louisiana*, 379 U.S. 559 (1965) (ban on *place* of demonstration, near courthouse, found reasonable); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (ban on *manner* of communication, by means of sound truck, found reasonable).

113. 452 U.S. at 75 (quoting *Grayned v. City of Rockford*, 408 U.S. at 116).

114. *Id.*

115. *Id.* at 75-76.

limits of the Borough.¹¹⁶ The Court noted that the lower courts had made no findings regarding such outside availability.¹¹⁷ In the absence of such findings, the Court reiterated the traditional rule that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."¹¹⁸ Thus, in the majority's view, the Borough had failed to justify its overbroad restriction on an admittedly protected form of expression.

B. Justice Blackmun's Concurrence

Justice Blackmun joined in Justice White's opinion but wrote separately to address two points. First, he took the position, consonant with Justice Marshall's position in *Belle Terre*,¹¹⁹ that there is no presumption of validity for the zoning power when the first amendment is implicated.¹²⁰

Justice Blackmun's second point addressed the most controversial aspect of *Schad*: "the suggestion that a local community should be free to eliminate a particular form of expression so long as that form is available in areas reasonably nearby."¹²¹ He did not read the Court's opinion as reaching such a conclusion, nor did he endorse it.¹²² He emphasized that, although *Young* upheld the reasonable regulation of a protected form of expression within a political subdivision, under the facts of *Young*, access to the protected expression was preserved within the subdivision.¹²³ Justice Blackmun asserted that an individual's right to free expression should not depend upon the availability of that expression in a nearby community in which the individual has no political voice.¹²⁴ He concluded with the admonition that the Court is obliged under the first amendment to protect "minorities against the 'standardization of ideas . . . by . . . dominant political or community

116. *Id.* at 76.

117. *Id.*

118. *Id.* at 76-77 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

119. See *supra* notes 30-35 and accompanying text for a discussion of Justice Marshall's dissent in *Belle Terre*.

120. 452 U.S. at 77 (Blackmun, J., concurring). Justice Blackmun emphasized "that the presumption of validity that traditionally attends a local government's exercise of the zoning power carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment." *Id.*

121. *Id.* at 77-78.

122. *Id.* at 77-79.

123. *Id.* at 78. "[T]he city of Detroit . . . preserved reasonable access to the regulated form of expression within the boundaries of that same subdivision." *Id.* (emphasis added).

124. *Id.*

groups.’”¹²⁵

C. Justice Powell's Concurrence

Justice Powell, joined by Justice Stewart, agreed with Justice White's overbreadth analysis, thereby creating a majority in support of resolving the controversy on first amendment grounds.¹²⁶ Justice Powell wrote separately, however, to announce an unprecedented view. Without expressly articulating a rationale or marshalling authority, Justice Powell contended that a residential community that had excluded or severely limited *commercial use* should be allowed, by means of a carefully drawn ordinance, to “regulate or ban all commercial public entertainment.”¹²⁷

D. Justice Stevens' Concurrence

Justice Stevens concurred in the judgment in *Schad* “without endorsing the overbreadth analysis employed by the Court”¹²⁸ For Justice Stevens, the outcome of the case turned upon the allocation of the burden of persuasion. If it were clear from the record that this was “a simple attempt by a small residential community to exclude the commercial exploitation of nude dancing from a ‘setting of tranquility,’”¹²⁹ he would compel the bookstore owners to overcome the usual presumption of validity. He found, however, the text of the ordinance ambiguous and the factual record unclear as to what type of commercial zone actually existed in Mount Ephraim.¹³⁰ Thus, the situation in *Schad*, as revealed in the factual record, could not properly be characterized as a simple zoning controversy.

Justice Stevens concluded that because “the record is opaque” and, assuming that live nude dancing is in some manner protected by the first amendment, “the Borough must shoulder the burden of demonstrating that appellants’ introduction of live entertainment had an identifiable adverse impact on the neighborhood or on the Borough as a whole.”¹³¹ Neither the text of the ordinance nor the facts in the rec-

125. *Id.* at 79 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949)).

126. *Id.* at 79 (Powell, J., concurring).

127. *Id.*

128. *Id.* at 84-85 (Stevens, J., concurring).

129. *Id.* at 79.

130. *Id.* at 80. Justice Stevens observed that “[w]ithout more information about this commercial enclave . . . , one cannot know whether the change in appellants’ business in 1976 introduced cacophony into a tranquil setting or merely a new refrain in a local replica of Place Pigalle.” *Id.* at 83.

131. *Id.* at 83.

ord convinced Justice Stevens that the Borough had met this burden.¹³² Accordingly, the bookstore owners' conviction under such circumstances could not stand.

In a footnote, Justice Stevens expressed complete agreement with Justice Powell's view that a residential community could regulate or ban commercial public entertainment.¹³³ "Surely, a municipality zoned entirely for residential use need not create a special commercial zone solely to accommodate purveyors of entertainment."¹³⁴

E. Chief Justice Burger's Dissent

Chief Justice Burger rejected the Court's overbreadth analysis, viewing *Schad* as "nothing more than a variation on [the] theme"¹³⁵ of earlier zoning cases like *Belle Terre*.¹³⁶ He characterized Mount Ephraim as a small, "placid, 'bedroom' community"¹³⁷ that should be free to zone in accordance with its citizens' "conception of the 'decent life.'"¹³⁸ To him, it was clear that "the citizens of the Borough of Mount Ephraim meant only to preserve the basic character of their community."¹³⁹ He maintained that "by thrusting their live nude dancing shows on this community the appellants alter and damage that community over [the community's] objections."¹⁴⁰ Thus, the ordinance, "[a]s applied in this case," operates only to prevent such damage and is therefore valid.¹⁴¹

Furthermore, Chief Justice Burger argued: "Even assuming that the 'expression' manifested in the nude dancing that is involved here is somehow protected speech . . . , the Borough . . . [may] regulate it."¹⁴² Citing *Young*, he asserted that such regulation imposed only "a minimal intrusion on genuine rights of expression"¹⁴³ because this kind of entertainment was available in nearby, "more sophisticated cities."¹⁴⁴ In his opinion, "[t]o say that there is a First Amendment right to im-

132. *Id.* at 84.

133. *Id.* at 84 n.11.

134. *Id.*

135. *Id.* at 86 (Burger, C.J., dissenting).

136. 416 U.S. 1. See *supra* notes 23-29 and accompanying text for a discussion of the holding in *Belle Terre*.

137. 452 U.S. at 85 (Burger, C.J., dissenting).

138. *Id.* at 87.

139. *Id.* at 86.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 87.

144. *Id.*

pose every form of expression on every community, including the kind of 'expression' involved here, is sheer nonsense."¹⁴⁵

V. ANALYSIS

A. *A Response to Young?*

Relying on *Young*, the New Jersey courts "sought to avoid or meet the first amendment issue only by declaring that the restriction on the use of appellants' property was contained in a zoning ordinance that excluded all live entertainment from the Borough, including live nude dancing."¹⁴⁶ Such an expansive interpretation of the zoning power, at the expense of free expression, illustrates the potential for misapplication inherent in *Young*.

The state courts' reading of *Young*, and a perceived need to define clearly the first amendment's relationship to the zoning power, may explain why the *Schad* Court elected to dispose of the case on first amendment grounds rather than on available alternative grounds.¹⁴⁷ It may also explain the Court's analytical approach.¹⁴⁸ Instead of focusing on the ordinance as specifically applied to the bookstore owners, the majority reviewed the facial constitutionality of the zoning ordinance. The Court determined that "[b]ecause appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own."¹⁴⁹ The Court was able to recognize the bookstore owners' standing to raise a facial overbreadth claim because it had determined that the ordinance, by its own terms, completely prohibited a wide range of expression: *all live entertainment*.¹⁵⁰

145. *Id.* at 88.

146. *Id.* at 67-68.

147. *Id.* at 65 n.4. The bookstore owners argued that the ordinance, as applied to them, abridged rights to due process and equal protection because it was arbitrary and irrational in prohibiting live nude dancing, while allowing the exhibition of films containing nude dancing. *Id.* Because the Court sustained the owners' first amendment challenge, it did not reach these additional claims. *Id.*; see, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (specific application of a residential-only use restriction to appellant's industrial land found arbitrary and unreasonable and thus did not promote the public health, safety, morals or welfare).

148. The Court eschewed the narrower "as applied" method of review, which "allows the law to operate where it might do so constitutionally and vindicates a claimant who shows that his own conduct is within the first amendment and cannot be burdened in the manner attempted." See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844 (1970).

149. 452 U.S. at 66 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972)).

150. The Court's determination that the ordinance impacted upon a wide range of expression is crucial. Without such a determination, the overbreadth analysis, which ulti-

In addition to facilitating an overbreadth analysis, the focus on the ordinance's exclusion of all live entertainment had two other crucial effects upon the disposition of the issue. First, the finding of an impact upon a broad category of expression brought into consideration a formidable body of first amendment law concerning the protection of entertainment.¹⁵¹ Armed with this precedent, the Court could posit authoritatively that entertainment, including live entertainment, is *fully* protected under the first amendment. By contrast, a narrower analysis of the ordinance *as applied* would have brought into consideration a narrower line of precedent concerning the protection of live nude dancing.¹⁵² The three cases supporting the protection of live nude dancing¹⁵³ do not expressly state the degree of protection to be afforded that form of expression. *Young*, however, expressly limits the amount of protection to be extended adult entertainment.¹⁵⁴ Hence, *Young* would have limited the effectiveness of an argument contending that live nude dancing, as a form of adult entertainment, is fully protected under the first amendment.

Once the Court established that the expression prohibited by the ordinance enjoyed such full protection, there was a strong basis for applying strict scrutiny.¹⁵⁵ Thus, the Court's analytical approach appropriately enabled it to overcome the presumption of validity traditionally accorded zoning ordinances and shift the burden of justification to the Borough.¹⁵⁶ When read in conjunction with Justice Blackmun's concurrence,¹⁵⁷ this aspect of the majority opinion seems to be an unequivocal rejection of the presumptive validity of those zoning ordinances that impact upon the exercise of protected first amendment

mately disposed of the case in the bookstore owners' favor, would have been inapplicable. "[I]f the statute's deterrent effect on legitimate expression is not 'both real and substantial,' and if the statute is 'readily subject to a narrowing construction by the state courts' . . . the litigant is not permitted to assert the rights of third parties." *Young v. American Mini Theatres, Inc.*, 427 U.S. at 60 (citation omitted).

151. *See supra* note 95 and accompanying text.

152. The ordinance, as applied to the bookstore owners, prohibited only live nude dancing. Three earlier Supreme Court cases held that live nude dancing is a protected form of expression. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975); *California v. La Rue*, 409 U.S. 109 (1972).

153. *See supra* note 152.

154. *See supra* notes 42-51 and accompanying text.

155. 452 U.S. at 68-69. The Court maintained that the right to free expression, being a fundamental right, required heightened judicial protection under the due process clause. *Id.*; *see also Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

156. "As is true of other ordinances, when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest." 452 U.S. at 68.

157. *See supra* notes 120-25 and accompanying text.

rights. The state courts' use of *Young* to sustain the exercise of the zoning power in *Schad* seems clearly disapproved.¹⁵⁸

That the majority opinion is a response to *Young's* failure to define clearly the relationship between fundamental rights and the zoning power is also evident from its discussion of that decision. The *Schad* Court stated explicitly that "this case [*Schad*] is not controlled by *Young v. American Mini Theatres*, the decision relied upon by the Camden County Court."¹⁵⁹ It distinguished *Young* as a case where first amendment rights were only incidentally and minimally implicated by the zoning ordinance.¹⁶⁰ The fact that the challenged ordinance in *Young* did not operate to exclude expression, but merely regulated its location, was emphasized as a distinguishing characteristic.¹⁶¹ The implication is that, while *Young* may authorize reasonable time, place, or manner restrictions of certain protected expression, the *total exclusion* of that expression will not be tolerated. Hence, the exclusion of protected expression should be permitted only in certain limited circumstances analogous to those previously recognized by the Court.¹⁶²

B. Problems with the Overbreadth Analysis

The overbreadth analysis in *Schad* left unresolved a specific question about adult entertainment. The Court asserted that prior case law in nonzoning contexts establishes as a general principle that nonobscene commercial entertainment enjoys full protection as a form of speech under the first amendment.¹⁶³ *Young*, however, raised a serious question concerning the degree of first amendment protection to be afforded adult entertainment in a zoning context.¹⁶⁴

Although the facts in *Schad* presented an opportunity to resolve

158. As noted by Justice Blackmun, after the *Schad* decision, "it should be clear that where First Amendment interests are at stake, zoning regulations have no such 'talismanic immunity from constitutional challenge.'" 452 U.S. at 77 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. at 75 (Powell, J., concurring)).

159. 452 U.S. at 71.

160. *Id.* at 71 n.10.

161. *Id.* at 71.

162. "Any system of prior restraint . . . 'comes to this Court bearing a heavy presumption against its constitutional validity.'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). The Court has tolerated prior restraints of expression only in extreme situations: to protect national security during wartime, to prevent the publication of obscene material, to protect a local community from incitements to violence, and to prevent the forceful overthrow of the government. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (threat of future libelous publications insufficient to justify prior restraint on newspaper publication). See also *supra* note 44.

163. See *supra* note 95.

164. See *supra* notes 47-51 and accompanying text.

that question, the Court avoided this issue by focusing on the ordinance's prohibition of *all* live entertainment, instead of the Borough's application of the ordinance to suppress live nude dancing.¹⁶⁵

Moreover, while examining the ordinance's impact on the expressive activities of *others*, the Court was silent as to whether the impact upon the bookstore owners' activity, *alone*, would have been sufficient to sustain the challenge.¹⁶⁶ This silence, when read in light of Justice Stevens' and Chief Justice Burger's direct assertions that the adult entertainment deserves less protection than other forms of expression,¹⁶⁷ suggests that impact upon adult entertainment alone may not have been enough to invalidate the ordinance. By omitting to rule expressly on the degree of protection to be extended adult entertainment generally, the Court perpetuated the lingering inference engendered by *Young* that there may be varying levels of first amendment protection of various forms of expression.¹⁶⁸

Another problem with the *Schad* Court's overbreadth analysis is that it created conflicting inferences as to the scope of the holding, thereby inviting qualifying comments by several of the Justices.¹⁶⁹ The majority opinion called for close judicial review even for zoning ordinances which "only incidentally" restrict freedom of expression.¹⁷⁰ Through its treatment of *Young*, the majority also indicates that complete exclusion of protected expression will not be tolerated for the same reasons which might justify restricting its location.¹⁷¹ A broad reading of the opinion, therefore, would prevent a municipality from completely excluding protected forms of entertainment, including live nude dancing.

165. See *supra* notes 74-77 and accompanying text. From the facts in the record it is clear that entertainment, including live entertainment, was permitted in the commercial zone. 452 U.S. at 64 n.3. The zoning ordinance, however, operated to ban only live nude dancing. *Id.* at 64.

166. Overbreadth challenges are sustained even if the particular claimant's speech is *unprotected* because of "the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Young v. American Mini Theatres, Inc.*, 427 U.S. at 59 n.17.

167. See *infra* note 176.

168. For support for the proposition that *Young* created varying levels of first amendment protection see Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L. Q. 321, 357-59 (1977).

169. Justices Blackmun, Powell, Stevens, and Chief Justice Burger all thought it necessary to write separate opinions. 452 U.S. at 77, 79, 85.

170. *Id.* at 68 n.7.

171. The Court in *Young* presaged such a result when it acknowledged that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." 427 U.S. at 71 n.35.

Five of the Justices recognized the potential for this broad reading and expressed concern about the scope of the holding. Justice Powell, joined by Justice Stewart, wrote separately for the sole purpose of expressing their view that the holding should not extend to a residential community that wished to ban or severely limit all commercial uses.¹⁷² According to these Justices, a carefully drawn ordinance that regulated or banned all commercial public entertainment "could be appropriate and valid in a residential community where all commercial activity is excluded. Similarly, a residential community should be able to limit commercial establishments to essential 'neighborhood' services permitted in a narrowly zoned area."¹⁷³ This opinion failed to include reasoning or precedent in support of this view. The fact that Justices Powell and Stewart so chose to hypothesize, however, evidences that the majority opinion is susceptible to an expansive interpretation.

Justices Stevens and Burger (joined by Justice Rehnquist) expressed similar concern in separate opinions.¹⁷⁴ The rationale for excluding certain forms of expression from residential communities is questionable. Their argument seems to be that local power to deal with local problems is broad, and the Court traditionally has deferred and should continue to defer, to the zoning authority's judgment.¹⁷⁵ Such deference should persist when nonpolitical or nonphilosophical expression, including adult entertainment, is involved because such expression does not warrant complete constitutional protection.¹⁷⁶ According to this view, as long as there is reasonable access to the form of entertainment outside the residential community, total exclusion is permissible.¹⁷⁷

172. 452 U.S. at 79 (Powell, J., concurring).

173. *Id.*

174. *Id.* at 79 (Stevens, J., concurring in the judgment); *id.* at 85 (Burger, C.J., dissenting). In a footnote, Justice Stevens stated that he had "no doubt that some residential communities may, pursuant to a carefully drawn ordinance, regulate or ban commercial public entertainment within their boundaries. Surely, a municipality zoned entirely for residential use need not create a special commercial zone solely to accommodate purveyors of entertainment." *Id.* at 84 n.11 (citations omitted).

175. *Id.* at 79-80 (Stevens, J., concurring in the judgment); *id.* at 85 (Burger, C.J., dissenting).

176. Justice Stevens stated that "even though the foliage of the First Amendment may cast protective shadows over some forms of nude dancing, its roots were germinated by more serious concerns that are not necessarily implicated by a content-neutral zoning ordinance banning commercial exploitation of live entertainment." 452 U.S. at 80 (Stevens, J., concurring) (citing 427 U.S. at 60-61) (footnote omitted). Similarly, Chief Justice Burger maintained that "[t]o invoke the First Amendment to protect the activity [live nude dancing] involved in this case trivializes and demeans that great amendment." *Id.* at 88 (Burger, C.J., dissenting).

177. *Id.* at 80 (Stevens, J., concurring in the judgment); *id.* at 87 (Burger, C.J., dissenting).

This argument has some practical appeal; few would advocate constitutionally mandating the introduction of live nude dancing in a residential community. It ignores, however, important precedent as well as alternative means available to prevent such a scenario.¹⁷⁸ Initially, this argument grants local government great power in a situation that usually has called for a high standard of judicial review. Precedent indicates that strict scrutiny should apply when a fundamental right is even incidentally involved.¹⁷⁹ These three Justices attempt to circumvent the need for strict scrutiny by finding the right involved to be of a lesser magnitude, thus triggering a less rigorous standard of review.¹⁸⁰ Their authority for this proposition appears to be *Young*.¹⁸¹ Because a clear majority of the Justices in *Young* did not support this view, however, its precedential value is open to question.

Also questionable is the view of Justices Stevens, Rehnquist, and Chief Justice Burger that a total exclusion of protected expression is permissible if there is reasonable access to the form of expression outside the community. The application of the reasonable access doctrine in this context significantly expands the notion of reasonable access as developed and applied in other contexts.¹⁸² These Justices would analyze the legitimacy of a local zoning ordinance based upon conditions outside the zoning authority's sphere of control. This view leaves unanswered several troubling questions. How can a residential

178. See *infra* notes 196-202 and accompanying text for a discussion of available alternatives.

179. "Even where a challenged regulation restricts freedom of expression *only incidentally* or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression." 452 U.S. at 69 n.7 (citing *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)) (emphasis added); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

180. See *supra* note 176; see also *supra* note 168.

181. Justice Stevens' equal protection analysis in *Young*, which suggests that adult entertainment should receive less protection than other forms of expression, was joined by only three other Justices. 427 U.S. at 73 n.1 (Powell, J., concurring).

182. Prior cases discussing the reasonable access doctrine refer to providing access to the form of expression *within* the forum or entity attempting to regulate the expression. Thus, the entity regulating the expression was also responsible for assuring some reasonable access to it. See *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 777 (1976) (complete suppression of the advertising of drug prices within the state held unreasonable because it did *not* provide reasonable access to the communication within the state); cf. *Grayned v. City of Rockford*, 408 U.S. 104, 116, 118 (1972) (restriction on picketing school during school hours held reasonable because appellant was able to picket school during nonschool hours); *Kovacs v. Cooper*, 336 U.S. 77, 85-89 (1948) (ban on use of a sound truck within city to communicate ideas held reasonable as long as the ideas could be communicated *within the city* by less obtrusive means).

community ensure that reasonable access to commercial entertainment outside its jurisdiction will remain? What happens if the outside commercial entertainment establishments go out of business or the community within which they are located decides to exclude them? Will the residential community's enactment be invalidated by such unilateral outside action?

Although this view is not asserted in the majority opinion, it nevertheless adumbrates a serious erosion of first amendment protection of expression. Collectively, these five Justices would allow local governments to expand their zoning power, in effect, to censor completely certain forms of heretofore protected expression.

C. *A Commercial-Residential Dichotomy?*

One implication that may be drawn from the opinions advocating an expansion of the reasonable access doctrine is that a zoning entity's power to exclude protected expression depends upon the existence and nature of commercial uses within that entity. In response to the Borough's contention that the ordinance was a reasonable time, place, and manner restriction, the majority identified the crucial question as "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."¹⁸³ The Court then determined that because the Borough had allowed commercial uses¹⁸⁴ that posed problems similar to commercial live entertainment, it had failed to demonstrate that live entertainment was "basically incompatible" with those uses.¹⁸⁵ This reasoning left open the possibility, raised by the Borough, that had the Borough excluded *all commercial uses*, live entertainment (a commercial use) would be patently incompatible with the "normal" activity in a completely residential community, and on that score, excludable:¹⁸⁶ hence, a commercial-residential dichotomy.

While the majority opinion left open the possibility of a total exclusion of protected expression, based on whether the zoning entity allowed any commercial use, five Justices expressly posited that an exclusion on the basis of such a commercial-residential distinction

183. 452 U.S. at 75 (quoting *Grayned v. Rockford*, 408 U.S. at 116-17).

184. *See supra* note 71.

185. 452 U.S. at 75.

186. *Id.* The Court stated in a footnote: "Thus, our decision today does not establish that every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which live entertainment is permitted." *Id.* at n.18.

would be permissible.¹⁸⁷ All five asserted that a hypothetical residential community could invoke the zoning power to exclude commercial entertainment if it had excluded or severely limited commercial uses generally.¹⁸⁸ The inevitable conclusion is that at least five members of the *Schad* Court would allow the zoning power to create less freedom of expression in residential communities than in large urban centers or communities with established commercial zones.

Because, prior to *Schad*, entertainment was considered a fully protected form of expression under the first amendment,¹⁸⁹ the justification for allowing its total exclusion from residential communities must be sought in the expanded view of reasonable access in nearby communities. As pointed out by Justice Blackmun, "[i]t would be a substantial step beyond [*Young*] to conclude that a town or a county may legislatively prevent its citizens from engaging in or having access to forms of protected expression that are incompatible with its majority's conception of the 'decent life' solely because these activities are sufficiently available in other locales."¹⁹⁰ Both Justices Blackmun and White expressly asserted the traditional view that "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."¹⁹¹ Evidently, the Justices in *Schad* disagree regarding the validity of the rationale underlying the commercial-residential dichotomy.¹⁹²

Prior to *Schad*, the legitimacy of a time, place, or manner restriction depended upon the existence of reasonable access to alternative channels of communication *within* the forum imposing the regulation of expression.¹⁹³ The Justices advocating a commercial-residential dichotomy would redefine the "forum" to include more than one autonomous political subdivision. The aggregate effect of myriad local communities excluding certain forms of admittedly protected expres-

187. *Id.* at 79 (Powell, J., concurring); *id.* at 84 n.11 (Stevens, J., concurring in judgment); *id.* at 85 (Burger, C.J., dissenting).

188. *Id.*

189. *See supra* note 95.

190. *Id.* at 78 (Blackmun, J., concurring).

191. *Id.* *Cf.* *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

192. It appears that Justices White, Brennan, Marshall, and Blackmun do not support the notion that protected expression may be excluded from one zoning entity so long as it is available within another zoning entity reasonably nearby. *See supra* text accompanying notes 190-91.

193. *See supra* note 182. In previous cases, the reasonableness of the regulation was judged by the availability of alternative channels of communication *within* the governmental entity seeking to regulate the expression.

sion would result in a vast disparity of protection throughout the country as well as within certain regions. Individuals from residential communities would be forced to depend on other communities, in which they have no representation or control, for the full exercise of their constitutional rights. Conversely, residents of communities with established commercial zones would have to bear any costs incident to providing access to the expression, while members of the exclusively residential communities would receive a gratuitous benefit.

Moreover, granting a community the power to exclude otherwise protected expression in order to "provide a setting of tranquility"¹⁹⁴ evokes the spectre of a local majority, acting with governmental approval, imposing its views as to the value of particular forms of expression upon an unconsenting minority. The first amendment has traditionally been construed to prevent just such a result.¹⁹⁵

D. Alternatives to Zoning as a Regulatory Device

Enlarging the zoning power to exclude protected expression unavoidably raises the issue of governmental censorship. The Court traditionally has had a strong aversion to such censorship. "Our distaste for censorship — reflecting the national distaste of a free people — is deep-written in our law."¹⁹⁶ Before furnishing local communities with a new instrument for imposing censorship, existing alternatives for controlling objectionable forms of expression should have been carefully considered.

In both *Young* and *Schad*, adult entertainment was the basis for the community's concern and action. The Court's obscenity decisions have vested broad power in local government to exclude expression found to be obscene.¹⁹⁷ If a community finds a form of adult expres-

194. 452 U.S. at 85 (Burger, C.J., dissenting).

195. See *Terminiello v. Chicago*, 337 U.S. 1, 3-4 (1949).

If the guarantees of the First Amendment were reserved for expression that more than a 'few of us' would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.

427 U.S. at 86 (Blackmun, J., dissenting).

196. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

197. See *Miller v. California*, 413 U.S. 15 (1973). *Miller* established a three part test for obscenity:

(a) whether 'the average person, applying contemporary community standards,' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by . . . state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

sion to be without redeeming value, it should be allowed to exclude it only by the standards established in the Court's obscenity decisions. The zoning power should not be made available as a vehicle for circumventing the first amendment principles underlying the obscenity law.

Similarly, communities are empowered to regulate and exclude forms of entertainment, including live nude dancing, in connection with the use of alcohol under the twenty-first amendment.¹⁹⁸ If a community's interest could be served by the proper exercise of this established power, it would obviate the need to extend the zoning power.

Additionally, under the principles set down in *Young*, communities have the power to regulate closely the location of adult entertainment. Many larger communities may well be able to deal with their problem under established principles without the expedient of exclusion presented in *Schad*.

The Court also has recognized the power of local communities to control nonobscene adult expression in order to protect children.¹⁹⁹ Conceivably, a residential community with a legitimate concern for the children residing or attending school within its boundaries could exclude adult expression for that limited, but compelling, purpose. Once again, there would be no need to expand the already broad zoning power into this area.

Finally, private land use devices are available to preserve the residential character of a neighborhood.²⁰⁰ Aside from the argument that private controls are a more economically efficient means of land use allocation, these devices would avoid direct governmental or legislative involvement in the determination of the value of a protected form of expression.

The above discussion briefly outlines existing means for controlling objectionable or undesirable forms of expressive activities, including adult entertainment. It is submitted that the Justices who

Id. at 24; see also *Roth v. United States*, 354 U.S. 476 (1957).

198. In *California v. LaRue*, 409 U.S. 109 (1972), the Court held that the states have broad power under the twenty-first amendment to regulate alcohol, and therefore were justified in imposing strict regulation of nudity and sexual explicitness in establishments serving liquor.

199. See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

200. See generally Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 711-19 (1973). The residential character of a neighborhood can be maintained privately through collective property rights established under *condominium* ownership. Similarly, if a single developer initially owns an entire neighborhood, he can effectively exclude many uses through the use of covenants, conditions, and restrictions. See R. NELSON, *ZONING AND PROPERTY RIGHTS* 16 (1977).

advocated the extension of the zoning power to include the suppression of protected forms of expression did so prematurely. Absent specific facts and circumstances, it is difficult to speculate whether a hypothetical residential community will be unable to deal with a troublesome form of protected expression under established alternatives. After *Schad*, it is reasonable to expect that some local communities, relying on the dicta concerning their ability to exclude protected expression,²⁰¹ may enact zoning ordinances which exclude protected expression before carefully considering established alternatives. First amendment rights of free expression may suffer unnecessary curtailment as a result.

Instead of endorsing such an expansive view of the zoning power, in the absence of specific facts demonstrating an urgent need, the five Justices who advocated the propriety of a total exclusion of expression by a commercial-residential dichotomy might better have protected constitutional rights by following the suggestion in Justice Blackmun's concurrence:

This case does not require articulation of a rule for evaluating the meaning of "reasonable access" in different contexts. The scope of relevant zoning authority varies widely across our country, as do geographic configurations and types of commerce among neighboring communities, and this issue will doubtless be resolved on a case-by-case basis.²⁰²

VI. CONCLUSION

The *Schad* decision is the first instance where a majority of the Supreme Court has sustained a first amendment challenge to the zoning power. It clearly delineates a specific area where the traditional special presumption of validity enjoyed by zoning ordinances will not prevail, and it promises active judicial review of zoning enactments that even incidentally encroach upon first amendment freedoms. Local zoning authorities are put on notice to draft with precision an ordinance that may implicate protected rights of expression.

The *Schad* Court, however, declined an opportunity to clarify precisely the degree of protection extended to nonobscene forms of adult entertainment as against local zoning enactments. By eschewing the issue, the decision failed to dispel the plurality rationale in *Young* which expressly limited the constitutional protection accorded adult entertainment. *Schad* may thus have strengthened the suggestion, which

201. See *supra* notes 175-82 and accompanying text.

202. 452 U.S. at 78-79.

originated in *Young*, that adult entertainment represents a unique and perplexing problem which may best be dealt with by the zoning power.²⁰³

Moreover, *Schad* may demonstrate, by implication, how local communities may completely exclude otherwise protected forms of expression through artful manipulation of the zoning power. The danger inherent in vesting such power in local authorities was recognized by Justice Powell in *Young*, when he cautioned that "courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression"²⁰⁴ Despite all its language concerning the protection of expression, *Schad* may have enhanced the potential for abuse of the zoning power.

Terrence M. King

203. See F. STROM, ZONING CONTROL OF SEX BUSINESSES 45 (1977).

204. 427 U.S. at 84 (Powell, J., concurring).

